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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KENNETH S. HOWER, Individually and as an officer of Sunflower Seventeen, Inc. and SUNFLOWER SEVENTEEN, INC., a corporation,

Petitioners,

vs.

PICINICH & RIGOLOSI, P.A., and RONALD J. PICINICH, Individually,

Respondents,

PETITION FOR A WRIT OF CERTIORARI

DEAN LYNCH, ESQ.
Counsel of Record
For Petitioners

DEAN LYNCH, ESQ.
Attorney at Law
Attorney for Petitioners,
KENNETH S. HOWER, Individually and as an officer of Sunflower Seventeen, Inc. and SUNFLOWER SEVENTEEN, INC., a corporation

P.O. Box 367
1 Essex Street
Hackensack, NJ 07601
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QUESTIONS PRESENTED

1. Is a violation of a Court Rule by a State Court a *per se* denial of due process under the Fourteenth Amendment of the United States Constitution?

2. Is a gross miscarriage of justice by a State Court a denial of due process under the Fourteenth Amendment of the United States Constitution?

3. Is a State appellate procedure which makes the exercise of rights under a court rule impractical a violation of due process under the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PETITION

The petitioning parties are Kenneth S. Hower, Individually and as an officer of Sunflower Seventeen, Inc. and Sunflower Seventeen, Inc., a Corporation.

The respondants are Picinich & Rigolosi, P.A. and Ronald J. Picinich, Individually.

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

RULES CITED

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

KENNETH S. HOWER, Individually and as an officer of Sunflower Seventeen, Inc. and SUNFLOWER SEVENTEEN, INC., a corporation,

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Respondents,

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth S. Hower, Individually and as an officer of Sunflower Seventeen, Inc. and SUNFLOWER SEVENTEEN, INC., a corporation respectfully prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court entered in this proceeding on December 18, 1986.

OPINIONS BELOW

1. The Denial of Petition for Certification of the Supreme Court of New Jersey, filed December 18, 1986, Docket #26,264 (Appendix A).

2. The Denial of Petition for Re-Hearing to the Superior Court of New Jersey, Appellate Division, filed October 20, 1986. This petition first raised the denial of the Fourteenth Amendment rights (Appendix B).

3. The opinion of the Superior Court of New Jersey Appellate Division, Docket #A-01875-85TL (Appendix C).

4. The opinion of the Trial Court, Superior Court of New Jersey Law Division, Bergen County, Docket #L-13094-84 (Appendix D).

JURISDICTION

On December 18, 1986 the Supreme Court of New Jersey denied petition for certification. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides in relevant part:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law; . . ."

2. New Jersey Court Rule 1:12 provides, in relevant part that:

1:12-1 "The judge of any court shall disqualify himself on his own motion and shall not sit in any matter, if he . . .

(d) has given his opinion upon a matter in question in the action; or

(e) is interested in the event of the action; or

(f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."

1:12-2 "Any party, on motion made before trial or argument and stating the reasons therefor, may apply to a judge for his disqualification."

3. New Jersey Disciplinary Rules provides, in relevant part that:

5-101 "Refusing employment when the interests of the lawyer may impair his independent professional judgment

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

STATEMENT OF THE CASE

In. 1966, Petitioner, Kenneth S. Hower and John Riegel formed a corporation, Sunflower Seventeen, Inc. (Sunflower) in which they each owned half the shares. The business of Sunflower was a fast food restaurant.

The business proceeded to operate at a profit accumulating over $100,000 in a corporate account at the Midland Bank and Trust Company (Midland).

In 1978 two banks, Midland and Interchange State Bank (Interchange) obtained judgments against John Riegel, totally unrelated to Sunflower, on notes that he had secured with stolen or forged securities. Midland commenced an action against John Riegel, Sunflower and Interchange to enforce its judgment by levying on the Sunflower account at Midland.

Hower retained Respondant Ronald J. Picinich and his firm to represent Sunflower and protect its interests. Picinich had previously represented Sunflower as to certain corporate matters. Picinich drew an answer which admitted that Sunflower owed approximately $50,000.00 to John Riegel. Hower objected to the answer; however, Picinich insisted it was the only way he would proceed in light of the corporation's conduct, which included matters he had counseled, and further advised Hower to withdraw the other half of the funds from the Midland account.

In May 1979, while the Midland action was still pending, Hower, during a meeting, was advised by Picinich that Picinich was a stockholder in Interchange. Hower was shocked by this obvious conflict of interest and stormed out of the office. Hower then retained Frederick Bernstein to replace the Picinich firm. Bernstein attempted to correct the harm of the disloyal answer by making a motion to amend the answer. This motion was denied in light of the passage of time and the Court's opinion that the issues were moot.

"Now, isn't it a bit academic in view of the answer that was filed by Mr. Picinich . . ."[1]

As a result of this denial, Sunflower was forced to trial under the Picinich answer. Sunflower could never overcome the prejudice resulting from the answer or the advice of Picinich and lost at trial.

The matter was appealed and upheld, the Appellate Court, with Judge Warren Brody participating, relied on Hower's withdrawal of funds, as "ample" evidence of the intention of the parties.[2]

As a result of the loss of the Midland case, the business of Sunflower was closed and Hower lost his livelihood. The big winner was Interchange, who not only recovered in the Midland case but by another action secured half of the half Hower had withdrawn.

Hower and Sunflower then commenced the within action in legal malpractice against Picinich and his firm. The Trial Court dismissed the Petitioner's case upon Respondent's motion for involuntary dismissal after Petitioner rested, stating that petitioner had not proved "that the attorney failed to meet the applicable standard of care" and "that such negligence resulted in and was the proximate cause of damage or loss suffered by the plaintiff." (Appendix D).

[1]Appellate Appendix, page 70 a at 75a.
[2]Appellate Appendix, page 62a at 64a.

The decision was appealed and the Appellate Court stated that "In view of the undisclosed conflict defendant should not have given plaintiff legal advice on any subject related to Interchange." Thus overturning the first ground for dismissal. However, the Appellate Court continued to state that "plaintiff must have presented some evidence from which a jury could reasonably conclude that taking defendant's advice probably caused plaintiff to lose the Midland case" and upheld the trial court decision based on the proximate cause issued. (Appendix C).

This was in spite of the facts that in evidence were the Midland decision of the Trial Judge which clearly showed the damage of the Picinich answer; as well as the advice to withdraw half of the money; the appellate decision which upheld same, saying the withdrawal was "ample evidence" for the outcome; the testimony of Mr. Bernstein that in light of the answer the Midland case was lost. These are only a partial recital of the Trial Evidence overlooked and not recognized as "some evidence" by the Appellate Court.

Judge Warren Brody sat on this appeal also and was requested to disqualify himself and refuse (Appendix E and F). Based on this refusal, a Petition for Re-Hearing was made in which the violation of R.1:12-1 and its relationship to the due process clause of the Fourteenth Amendment was raised. The Petition for Re-Hearing was denied by order signed by Judge Brody filed with the Court on October 20, 1986.

A Petition for Certification was filed with the New Jersey Supreme Court raising the due process claim as well as the other issues; same was denied by order filed with the Court on December 18, 1986 (Appendix A).

REASONS FOR GRANTING WRIT

"JUSTICE AND THE PERCEPTION THAT JUSTICE IS DONE ARE INDISPENSIBLE TO THE SURVIVAL OF AN ORDERED SOCIETY"*

No one can disagree with the above statement which plainly states the foundation of due process and law.

With this thought in mind I shall recite the events which clearly demonstrate a departure from same in this case.

On September 9, 1986, the within case on appeal was orally argued before Judges Brody and Long. As is the procedure in New Jersey, counsel does not know which Judges will hear an appeal until arriving at the Court House. I arrived at the Court House at 11:15 AM with my client and first became aware that Judges Brody and Long would hear the case. At that time, I did not realize that Judge Brody had sat on the Appeal in the Midland Case. My only excuse for not realizing same was my own nervousness, as well as the fact the Midland Per Curium Decision starts on a second page and I was never too interested in the caption, but flipped the page to get at the substance.

I had come to the oral argument prepared to give a presentation I had worked on with the aid of my client, however, I had only gotten two sentences out of my mouth when Judge Brody interrupted with a speech concerning issues not raised in the present case. From this point forward, the oral argument really lived up to its name, and the Judges and I verbally paried for about a half hour. At one point, Judge Brody stated in effect that he was the Court of last resort, and I'd better not show my frustration, and show the Court more respect. This comment was triggered by my comment that the Appellate Court in the Midland Case was way off base, and the fact that I looked away from him when he made the comment about being the Court of last resort. At the time I was at a complete loss to understand this aggressive attitude.[3]

I left the Court to be greeted by my client's displeasure that points were not made we had discussed, as well as his question of why Judge Brody was all over me. The above facts recapped in my letter to Judge Brody dated 9/11/86 in which I requested he excuse himself and not render a decision, but have another judge hear the matter (See Exhibit E). Judge Brody responded by letter on 9/15/86 in which he refused (See Exhibit F).

Applying the new court rule 1:12-1 it would appear clear that Judge Brody was under a duty to disqualify himself. The mandatory language of "shall" left him no alternative and his actions demonstrated his bias, and clearly fall within the intent of subparagraph (f). I, further, certify to this Court that both Hower and myself believe a fair and unbiased hearing and judgment was precluded, because Judge Brody had given his opinion as in the Midland case which was dismissed as "clearly without merit."[4]

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[3]It is noted that no written or tape record is made of oral argument which greatly hinders appeal therefrom.

[4]"The Appellate Division devoted virtually the entire oral arguement to the conflict issue, eventually obtaining a frank acknowledgment from Interchange's attorney that Picinich had been in conflict but that the bank's attorneys of record had not been aware of it, as if to say that conflict was permissible so long as neither conspiracy nor collusion were additionally shows."

As a result of this violation of a Court Rule by the state Court, Petitioner was denied due process of the law.

In light of such a clear violation of a Court Rule, Petitioner was shocked that the New Jersey Supreme Court did not accept certification of the within case when this issue was raised. It is noted that the Petition for Certification to the New Jersey Supreme Court was written in a rather unorthodox manner with strong language in the hope it would attract attention. This, however, failed and was denied by form letter.

THE SUPERVISORY AUTHORITY OF THE SUPREME COURT MUST BE EXERCISED TO CORRECT A STATE COURT PROCEDURE WHICH DENIES DUE PROCESS OF LAW

As set forth in the Statement of the Case, Judge Warren Brody sat on the appeal of the underlying case (Midland) and on the within case. The facts ending to this situation relate to the due process or lack thereof in the New Jersey Appellate Court System. That system gives no notice to the parties as to which judges will sit on a given appeal, thus the injustice complained of has a great likelihood of repetition.

In spite of the fact that as stated previously it is mandated by R.1:12-1 that Judge Brody disqualify himself, the present court procedure foreclosed the right to make a motion as provided by R.1:12-2 (See Appendix E and F).

Further the petition for Re-Hearing appeared to be considered only by the judge or judges involved and therefore can only lead to the conclusion that same is an illusory when dealing with such a sensitive issue as disqualification for bias (Appendix B).

THE WITHIN CASE IS SYMPTOMATIC OF THE PRESENT LEGAL SYSTEM'S FAILURE TO PROVIDE DUE PROCESS OF LAW.

If the legal system worked as it was intended, the within case would have started and ended in one thirty minute meeting almost ten years ago. If Mr. Picinich had disclosed his conflict of interest, as required by DR5-101 (A), at the first meeting, Hower would have left the office prior to the disloyal answer. But, that didn't happen and therefore Hower and Sunflower were denied due process.

When Hower retained another attorney, the Court had the ability to rectify the situation, but failed to do so; again denying Petitioner due process. The conflict of interest seemed not to concern the Court, as much as the passage of time, because as the Court stated the case "has been decided without any court deciding it," by the Picinich answer.[5]

The conflict of interest had been the seed; the actions of Picinich, fertilizer; and the answer, a tree which could only bear poison fruit. The harvest was plentiful for Midland and Interchange as the Trial Court and Appellate Court used each admission in the answer, and each action by Hower, which Picinich had advised, to justify the cutting off of Sunflower at its roots.

The remedy at law in light of these events would appear to be the within legal malpractice case against Picinich and his firm.

Life is never that simple. The Picinich firm is politically powerful; a partner was the Democratic Chairman of the County and also enjoyed state-wide influence, in a state where the judiciary is appointed by the Governor.

[5]Appellate Appendix, page 70a at 73a.

With honor amongst them, no attorney in the local county would agree to act as an expert. A prestigious out of county firm was retained through an associate, the file was forwarded in November 1984. The associate advised there should be no problem with the report. The firm's name was submitted in discovery.

On the eve of the trial, the senior partner in the firm did not share the associate's enthusiasm and made it clear his firm would not participate.

All did not seem lost, however, due to the consolidation of a suit to recover legal fees case filed by Picinich prior to the malpractice case which was required by the Rules (R.4:38-1) to proceed first. This would give Petitioner the opportunity to have Picinich on the stand to explain his actions; particularly the billing for preparation and filing of an amended answer, which never happened.[6]

However, this never happened either since without notice the trial judge on the morning of trial decided the malpractice case would proceed first, partly due to the fact he was advised there was no expert, which he believed was necessary for the case to reach the jury.

The court received in evidence, the answer drawn by Picinich; the amended answer drawn but unable to be filed by Bernstein; the decision of the Trial Judge and Appellate Court in the Midland case, (only a partial list of documentary evidence). Further, it was stipulated by the parties that the money in the account at Midland Bank was generated by the sale of hot dogs, hamburgers and ice cream by Sunflower. Also, the Court heard the testimony of Hower, his wife, and Mr. Bernstein as well as other testimony which in essence boiled down to the facts that (1) the Midland case was tried under the Picinich answer and Sunflower therefore lost; (2) Hower had been persuaded to sign the answer at Picinich's insistance one year prior to

[6]Appellate Appendix 5a.

the disclosure of the Conflict of interest; (3) Picinich and Bernstein were told the same facts prior to drawing the respective answers. Mr. Bernstein clearly testified he could do nothing but lose in light of the Picinich answer. The attorneys for Interchange and Midland testified the case was tried under the Picinich answer and they won.

However, the Trial Judge in spite of these facts, and many others, usurped the jury function, by grossly misapplying the law as to proximate cause. It is ironic that the judge spent almost ten pages explaining why he felt the evidence showed Picinich did nothing wrong, interpreting the evidence cited above, for Respondant when the law required him to interpret same in favor of Petitioner. It appears clear that the trial judge's belief that an expert was necessary and this clouded and biased him to the degree that he became a lawless judge.

This decision was so shockingly wrong that it presents a substantial question of the denial of due process as demonstrated, in a case very similar, in the Supreme Court of Hawaii, Collins v. Greenstein, 595 P.2d 575 (1979). The Court addressed the same issue of Defendant's Motion to dismiss Plaintiff's case in a legal malpractice case:

"The applicable standard on a motion for directed verdict is that "the evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and the inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach difference conclusions upon the crucial issue, then the motion should be denied and the issue should be submitted to the jury." Young v. Price, 47 Haw. 309, 313, 388, P.2nd 203, 206, (1963); Farrior v. Payton, 57 Haw. 620, 626, 562 P.2nd 779, 784 (1977)."

"The trial court's determination as a matter of law, that there was insufficient evidence that appellee's conduct was the proximate cause of appellant's injury was predicated on the fact that appellant had failed to establish by expert testimony the standard of professional care applicable to the appellee.

"In our opinion, the trial court erred in concluding that expert testimony was necessary, in the instant case, to establish the standard of care of the appellee and that, absent such evidence, appellee's conduct was not, as a matter of law, the proximate cause of appellant's alleged injury."

"Unlike medical malpractice cases, however, cases involving actions against attorneys rarely speak of the need for expert testimony to establish the applicable standard of care. See e.g., Smith v. Lewis, 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2nd 589, 78 A.L.R. 3d 231 (1975); Freeman v. Rubin, 318 So.2d 540 (Fla. Appl 1975); Wimsatt v. Haydon Oil Co., 414 S.W.2d 908 (Ky.1967), Rice v. Forestier, 415 S.W.2d 711 (Tex. Civ. App.1967)."

Most courts agree that the application of the standard of care to specific fact situations and the issue of whether or not the attorney has breached the duty of care owed is a question for the jury. Starr v. Mooslin, 14 Cal.App.3d 988, 92 Cal. Rptr. 583 (1971); Ishmael v. Millington, 241 Cal.App.2d 520, 50 Cal. Rptr. 592 (1966); Suritz v. Kelner, supra; Olson v. North, supra."

The plaintiff need not, however, prove that the defendant's negligence was the sole proximate cause of injury. Lysick v. Walcom, 258 Cal.App.2d 136, 157, 65 Cal. Rptr. at 598; Modica v. Crist, 129 Cal.App.2d 144, 148, 276, P.2d 614, 616 (1954); Ward v. Arnold, 52 Wash.2d 581, 584, 328 P.2d 164 166 (1958).

"In cases where reasonable persons might differ on the issue, or proximate cause, the question is one for the jury. Ishmael v. Millington, supra.; Restatement (Second) of Torts, supra, Section 434(2)(a); Prosser on Torts, supra, Section 45. Where reasonable persons would not dispute the absence of casuality, however, the court may take the decision from the jury and treat it as a question of law. Ismael vs. Millington, supra, 241 Cal.App.2d at 525-26, 50 Cal.Rptr. at 595.

"In situations involving more than one probable cause of a plaintiff's injury and where there is conflicting evidence on this issue, the question of proximate cause remains a jury question. Mitchell v. Branch, 45 Haw. 128, 363 P.2d 969 (1961); Young v. Honolulu Construction & Draying Co., 34 Haw. 426 (1938)."

"The case before us is not unlike that of Wimsatt v. Haydon Oil Co., supra. Here there is sufficient evidence on the record for a jury to find that the unseccussful attempts of attorney Ross to amend appellant's complaint and plead affirmative defenses was a foreseeable risk created by the conduct of appellee concerning Civil No. 915. It was for the jury, not the judge, to determine whether the intervening act of attorney Ross constituted a superseding cause of appellant's injury thus relieving appellee of liability."

". . . that appellee's conduct was a substantial factor in bringing about the appellant's loss. Hence, upon proper instruction from the Court on proximate cause, the jury should be permitted to determine appellee's liability.

If we replace Mr. Ross's name with Mr. Bernstein's and substitute Mr. Picinich for "appellee," the Hawaii decision reflects the just outcome.

It is noted that the trial judge believed the case too complex for the jury without an expert, however, juror two understood the crux of the case as stated to the Court.

"I can understand that was a crucial matter in the deliberations in terms of whether it was really a loan account or not a loan account, or it was just something that was a regular savings account. I understood that was part of the legal, or part of the crux of what the case was going to be decided about (See Appendix D).

Therefore, the trial court had assumed the jury would fall short of its constitutional duty, and by usurping its function the court denied the Petitioner due process.

CONCLUSION

It has been and remains the position of Petitioner that the only just conclusion to the matter at Bar can only be reached when this matter can be passed on by a jury of his peers.

It is feared that if your Honorable Court does not exercise its supervisory powers over the New Jersey Court system that the denial of due process complained of herein will continue in other matters and lead the public to a perception made by Archimedes centuries ago as to the character of any legal system: "These written laws are just like spider webs, the small and feeble may be caught and entangled in them, but the rich and mighty force through and despise them."

Respectfully submitted,

DEAN LYNCH
Counsel of Record
for Petitioner

DEAN LYNCH, ESQ.
Attorney at Law
Attorney for Petitioner

APPENDIX A

SUPREME COURT OF NEW JERSEY
C-419 SEPTEMBER TERM 1986
26,264

KENNETH S. HOWER, etc., et al.,

Plaintiffs-Petitioners,

vs.

PICINICH & RIGOLOSI, P.A., et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

FILED
Supreme Court
Dec. 18, 1986

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1875-85T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of December 1986.

CLERK OF THE SUPREME COURT

APPENDIX B

ORDER ON MOTION

KENNETH S. HOWER ETC ET ALS

–vs–

PICINICH & RIGOLOSI, P.A., AND RONALD J. PICINICH

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
A-1875-85T1
MOTION NO.
M-542-86
BEFORE PART:
A
JUDGE(S):
BRODY
LONG

FILED
Appellate Division
Oct. 20, 1986

MOTION FILED: OCTOBER 6, 1986
ANSWER(S) FILED:

DATE SUBMITTED TO COURT: OCTOBER 13, 1986

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 16th DAY OF OCTOBER, 1986, HEREBY ORDERED AS FOLLOWS:

	GRANTED	DENIED	OTHER
PETITION BY APPELLANTS FOR REHEARING		X	

SUPPLEMENTAL:

FOR THE COURT:

s/Warren Brody

WARREN BRODY J.A.D.

APPENDIX C

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPTIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1875-85T1

KENNETH S. HOWER, Individually and as an officer of Sunflower Seventeen, Inc. and SUNFLOWER SEVENTEEN, INC., a corporation,

Plaintiffs-Appellants,

v.

PICINICH & RIGOLOSI, P.A., and RONALD J. PICINICH, Individually

Defendants-Respondents.

Argued September 9, 1986—Decided September 22, 1986

Before Judges Brody and Long.

On appeal from Superior Court of New Jersey, Law Division, Bergen County.

Dean Lynch argued the cause for appellants.

John D. Brady argued the case for respondents (Richard A. Amdur, attorney; Mr. Amdur on the brief).

PER CURIAM

This is one of two actions that were consolidated below. In this one, Kenneth Hower (hereinafter referred to as plaintiff) sued the law firm of Picinich & Rigolosi, P.A. and Ronald Picinich (hereinafter referred to as defendant) for legal malpractice. In the other, the law firm sued plaintiff and his corporation, Sunflower Seventeen, Inc., for legal fees. The malpractice case, which was tried first, ended when the trial judge granted defendants' motion for an involuntary dismissal after plaintiff rested. Picinich & Rigolosi, P.A. thereupon voluntarily dismissed their action for fees. Plaintiff appeals. We affirm.

In distilling plaintiff's evidence, we accept as true the evidence and legitimate inferences therefrom that support his claims. Dolson v. Anastasia, 55 N.J. 2, 5 (1969).

Plaintiff and John Riegel each owned half the shares of Sunflower Seventeen, Inc. (the corporation). The corporation was formed in 1966. In April 1969, plaintiff and Riegel attended a shareholders meeting which defendant, plaintiff's attorney, also attended. The meeting was called in part to "formalize" an arrangement suggested by John Lenihan, the corporation's accountant, whereby the corporation would reduce its income taxes:[1] profits that the corporation would otherwise have retained would be distributed as salaries to the two shareholders who in turn would immediately lend the money back to the corporation. By that arrangement the corporation would enhance its working capital with funds that qualified as salary deductions instead of with funds on which it would have to pay an income tax. At the same time the funds would be available to the shareholders whenever they wanted the corporation to repay the loans.

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[1]When asked whether Mr. Picinich had explained this arrangement to him, plaintiff testified, "It was more a--creation of our accountant, Mr. Lenihan and Mr. Picinich, there was no great explanation given."

The shareholders put the plan into effect by opening a savings account[2] in the Midland Bank & Trust Company (Midland) into which corporate profits were deposited from time to time. The corporate books, corporate tax returns, corporate loan applications and the shareholders' tax returns treated these deposits as loans by the shareholders to the corporation with funds that they had received in the form of salaries from the corporation. At a January 1974 meeting the shareholders agreed to "cancel retroactively" interest due them on these "loans." From time to time, the shareholders withdrew sums from the loan account. Plaintiff admitted in his testimony that he invested "in a personal way" various sums that he had withdrawn from the account over the years.

Plaintiff described the period that followed 1969 as "good years and we accumulated profits which eventually [went] into a savings account at Midland Bank." The picture became clouded in 1978 when Riegel's personal financial problems began to affect the corporation. Two banks, Midland and Interchange State Bank (Interchange), had obtained judgments against Riegel on notes that he had secured with stolen or forged securities. Midland's judgment was $154,237.50 and Interchange's $137,425.

In May 1978, Midland commenced an action against Riegel, the corporation and Interchange to enforce its judgment by levying on the corporation's savings account at Midland which by then contained approximately $100,000. Plaintiff brought the suit papers to defendant and engaged him to represent the corporation and protect his interests.

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[2]The waiver of notice of the April 1969 shareholders meeting referred to the account as the "Officers Loan Account."

A dispute arose between plaintiff and defendant as to the position that the corporation should take in the answer with respect to the account. Plaintiff wanted the corporation to contend that the account contained general corporate funds, and was not a special loan account available to the shareholders' creditors. Defendant argued that the corporation was not free to take that position because the tax returns and records of the corporation and of the shareholders, the shareholders' periodic withdrawal of funds from the account and the accountant's anticipated testimony would make it impossible to contend that the funds in the account were not due the shareholders. The accountant had advised plaintiff that to protect his CPA license he would testify that the account contained only the proceeds of shareholder loans. Plaintiff finally agreed to sign an answer in which it was admitted that the funds in the account were shareholder loans. Plaintiff testified that he agreed because defendant "made it known that's the only way he would do it." On defendant's advice, plaintiff also testified at depositions in the Midland case that the funds in the account were shareholder loans.

Defendant advised plaintiff to withdraw his half of the funds in the account to secure them from Riegel's creditors. When plaintiff attempted to do so, however, he found that Midland had "frozen" the entire account. Defendant then persuaded Midland's attorney to authorize release of half the funds. Plaintiff thereafter withdrew approximately $50,000, which he deposited in a personal bank account.

It later occurred to plaintiff that the pressure from the banks (Midland had joined Interchange as a defendant because it had levied on the bank account after Midland) might be relieved if their officers were charged with negligence in lending Riegel money despite his notorious reputation. In May 1979, while the Midland action was still pending, plaintiff consulted defendant about instituting a stockholder's suit against both banks. When the discussion turned to the cost of acquiring the necessary shares of bank stock to commence such actions, defendant told plaintiff that the price of an Interchange share was $22, a fact he said he knew because he was a stockholder.

This was plaintiff's first knowledge of defendant's interest in Interchange. He thereupon concluded that the interest constituted a conflict with defendant's duty to advance his interests. Plaintiff therefore replaced defendant with a different attorney, Frederick Bernstein, who was amenable to asserting in the Midland action that the funds in the savings account were not shareholder loans. Also, making the funds in that account available to the corporation would enable it to exercise its option, under Article 11 of a stockholders' agreement, to purchase Riegel's shares which Interchange had levied upon in execution of its judgment. Bernstein therefore undertook to raise in the Midland action the priority of the corporation's option under Article 11 over Interchange's levy on Riegel's shares.

At first Bernstein's plans appeared to be frustrated when the court denied his motion to amend the complaint. He persisted, however, and the later pretrial order, entered by another judge, included among the issues to be tried "identification and determination of the nature of the assets due from Sunflower or Riegel levied upon [by] the judgment creditors" and "rights of judgment creditors against Sunflower to levy upon restricted stock."

The Midland trial was non-jury. The judge determined that the funds in the account were loans from the shareholders, that the corporation had the right under Article 11 to purchase Riegel's shares and that those shares were worth $45,000. We affirmed those determinations.

Plaintiff contends that defendant was ethically bound to reveal his interest in Interchange as soon as he learned in 1978 that plaintiff and Interchange had adverse interests, and that his failure to do so was evidence of malpractice, barring entry of an order of involuntary dismissal. Although there was no evidence of the proportion of total shares of Interchange owned by defendant, his partner and their partnership,[3] and there was no evidence that there would be any impact upon the value of those shares from the outcome of the Midland suit, we will assume that a conflict was present and that defendant's failure to disclose it was evidence of malpractice. Albright v. Burns, 206 N.J.Super. 625, 634 (App. Div. 1986).

[3]Defendant owned 300 shares, his partner owned 600 and their partnership owned 300.

It does not follow, however, that a showing of malpractice establishes a prima facie case. The plaintiff still bears the burden of proving proximate causation between the breach of duty and his loss. Albright, 206 N.J.Super. at 635. In view of the undisclosed conflict defendant should not have given plaintiff legal advice on any subject related to Interchange. That does not mean, however, that by giving plaintiff such advice defendant thereby became an insurer for all losses plaintiff thereafter sustained. To withstand a motion for involuntary dismissal, plaintiff must have presented some evidence from which a jury could reasonably conclude that taking defendant's advice probably caused plaintiff to lose the Midland case.

Ordinarily, in a legal malpractice action where a lawyer negligently failed to bring a prior action or a prior action was lost through his negligence, the plaintiff discharges his burden of proof respecting causation by reproducing in the malpractice trial, a trial of the prior action as it would have been tried purged of the effect of the malpractice. The defendant attorney assumes the role of the defendant in the prior action. See Hoppe v. Ranzini, 158 N.J.Super. 158, 165, 170 (Appl Div. 1978); Fuschetti v. Bierman, 128 N.J.Super. 290, 295, 296 (Law Div. 1974).

This so-called "suit within a suit," however, is not practical here where the plaintiff in the malpractice action was a defendant in the prior action. Where the roles are thus reversed and the parties have not agreed on some other way to replicate the prior trial, the plaintiff should "proceed through the use of expert testimony as to what as a matter of reasonable probability would have transpired at the original trial." Lieberman v. Employers Ins. of Wasau, 84 N.J. 325, 344 (1980). Here the parties did not agree on any manner in which the Midland trial would be reproduced and plaintiff offered no expert testimony that the Midland action would have turned out differently had defendant not given plaintiff the tainted advice. Plaintiff's claim was therefore properly dismissed.

The remaining issues raised by defendant are clearly without merit and therefore require no discussion. R. 2:11-3(e)(E).

Affirmed.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—BERGEN COUNTY
DOCKET NO. L-01309-84
CALENDAR NO. 84-1373

KENNETH S. HOWER, Individually and as an Officer of SUNFLOWER SEVENTEEN, INC., and SUNFLOWER SEVENTEEN, INC., A corporation,

Plaintiffs,

vs.

PICINICH & RIGOLOSI, P.A. and RONALD J. PICINICH, Individually, etc., et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

PICINICH & RIGOLOSI, P.A.,

Plaintiffs,

vs.

KENNETH S. HOWER, Individually and as an Officer of SUNFLOWER SEVENTEEN, INC., and SUNFLOWER SEVENTEEN, INC., a Corporation,

Defendants.

SPECIAL CIVIL PART
BCDC-426479
CALENDAR NO. 84-4226

Friday, June 28, 1985
Hackensack, New Jersey

BEFORE:
HONORABLE WILLIAM C. MEEHAN, J.S.C.,
And a Jury.

We don't have many cases on legal malpractice in this State, so we have some novel issues here. I would ask the jury should be allowed to express their moral sentiments on the issue, particularly in light of the conflict of interest.

MR. MACKEY: Thank God we don't have that system.

THE COURT: What system?

MR. MACKEY: That we leave it up to a jury to simply apply their morality free of the law.

THE COURT: Gentlemen, I have heard this case now for a number of days. Now, in this case to prevail the case of attorney or legal malpractice the plaintiff has the burden of proof as to the following element.

One, the existence of attorney/client relationship. In this matter there's no real dispute about that. We have D-1—or D-2 into Evidence, the retainer agreement, as well as from all the testimony, the only conclusion one can come to is Mr. Picinich was the attorney for Sunflower Seventeen at various times in these proceedings.

Two, the defendant's attorney performed legal services for the plaintiff. And again, that's not disputed. Papers presented to the Court, as well as testimony and exhibits indicate that.

Three, that the attorney failed to meet the applicable standard of care. And that; of course, is one of the items in dispute.

And four, that such negligence resulted in and was the proximate cause of damage or loss suffered by the plaintiff.

As to the latter two elements this Court is of the opinion that the general rule in New Jersey is certainly the plaintiff provide expert testimony. The Court is aware that expert testimo-

ny is not necessary in all cases to establish both duty and breach thereof. Typically expert testimony is not necessary in a case where it appears that the attorney's error was so obvious that a lay trier of the fact could recognize it as professional negligence without expert guidance.

The classic and simple example of that is a case where an attorney fails to file suit within the statute of limitations. The case you have on that is Passanante v. Yormark.

You also have cases whereby a mortgage document wasn't executed properly or an attorney failed to, in the St. Pius X House of Retreat v. The Camden Diocese fails to review the surveys to compare them to the contract.

The case before this Court involved certain complicated legal issues, the role and function of the pleadings and a choice by counsel of the appropriate strategy to follow during the course of a trial.

This Court does find it's going to grant the motion for the following reasons:

This is the type of case where expert testimony is necessary to lend proper guidance to a jury, because in order to determine what the standard of care is as to what should be included or not included in an answer I think we need some expert testimony to establish that fact. And then to show that that duty was breached.

Also the Court has a second concern in this case, and that is assuming malpractice has been committed, to prove that such was the proximate cause of the plaintiff's damages. In this regard this requires proof in this case; (figure 1), that the answer or the claim, I should say, that Mr. Hower wished to present was valid, and (figure 2), that but for the failure to file that answer, the result in the first trial would have been different. In this regard; namely, there would have been a finding that the monies on deposit with Midland Bank were corporate assets in no way tied up with the officers' loan account. The plaintiff in

this case, and I realize it's a difficult matter, has produced no evidence that would allow a jury to determine that had Mr. Picinich filed that answer and taken these as an alternative or actually almost a contradictory approach in the case that Judge Van Tassel tried, the result would have been different. In light of the absence of testimony in regard to two essential elements of plaintiff's case the Court finds, giving all credible inferences to plaintiff, reasonable minds could not find that defendant Picinich committed legal malpractice, which was a proximate cause of the damages to plaintiff.

In regard to that the Court wants to make it clear that it has accepted the testimony of the plaintiff as true and accurate, but the Court in regard to this finds that the evidence as presented here is overwhelming that Mr. Picinich made a conscious decision to file the answer, which has been marked P-2 into Evidence. It's clear that Mr. Picinich made a trial strategy judgment that was arrived at after meeting with Mr. Hower on a number of occasions, after a lengthy meeting that Mr. Hower described that took place with Mr. Hower, Mr. Lenihan and Mr. Picinich.

Mr. Lenihan was a long time account of the corporation. He was hired independent of and before Mr. Picinich was ever involved in the matter. And I remember asking Mr. Hower myself concerning it that there as a dispute by Mr. Picinich at first with Mr. Lenihan as to the status of the funds; that Mr. Lenihan the corporate accountant, was the one who convinced Mr. Picinich that he had to go with the books and records of the corporation that it was a loan account. I think the testimony is clear that the strategy was developed after these meetings with Mr. Lenihan and Mr. Hower. And the Court accepts that Mr. Hower wished to have the other position put forward, but that after consideration Mr. Picinich, in his attorney judgment, after discussions with Mr. Lenihan, did not think it was the position to take.

When an attorney exercises a judgment within the scope of a reasonable practice of attorneys it is not a proper subject of malpractice. No one has testified here Mr. Picinich's decision was not within the gambit of permissible strategy for an attorney. In fact, after listening to his case I can well understand why it was, because I think Mr. Picinich's strategy his client would end up with 50 per cent at worse and there would be no problem with the IRS or other taxing authorities concerning previous returns of all the parties.

I think it's clear that if an attorney decides, after review of all the matters and make a conscious decision to exercise his judgment not to present a defense, expert testimony is required to show that that decision was made outside the gambit, or outside the range of acceptable legal practice.

Also in regard to that Mr. Picinich made it clear to Mr. Hower that that was how he intended to proceed. Mr. Hower acquiesced in it. I'm not saying he encouraged it, but certainly he signed the forms and he accepted his attorney's advice concerning that.

It's clear Mr. Hower wanted to sue many people and Mr. Riegel had put him in a position of jeopardy; that he had very aggravated, insulted and mad creditors who were going to pursue every resource they could find available to them to find assets of Mr. Riegel and to get them.

It's noteworthy that in my mind that Mr. Hower wanted to sue the banks for making negligent loans, which really is not his concern, if he was a partner of a thief and someone puts himself in a position to be stolen, as obviously the banks did, it doesn't related back to Mr. Hower's problem. Mr. Hower's problems relate to being involved with Mr. Riegel. It's obvious Mr. Picinich didn't feel like suing on those. He told him that. And Mr. Hower wished to pursue suits as shareholders derivative type action ought to present his position, obviously he cold have sought other counsel, but had faith in the expertise of Mr. Picinich. Mr. Picinich exercised his legal judgment, as he had a duty to do on behalf of his client. And it doesn't shock this

Court the position he took as one being so outside the range such as not answering the complaint at all and letting a default judgment be entered, or something like that.

Now, one other issue is being raised concerning the DR-5-101 concerning representing someone who has a—when it's against competing financial interest would be a good synopsis of it, it's Paragraph A which states: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial business property or personal interest."

I think in regard to this matter, while Interchange State Bank is in the case, their main dispute or the dispute that was taking place basically resolved around Midland Bank's claim that they were entitled to the money. It would appear from the papers being filed that the other ones being sued were they could claim the assets. And Interchange State Bank was not the one who would be making the primary claim, but as a judgment creditor may have a claim and were in the matter.

There has been testimony that Mr. Picinich did own stock in the corporation of Interchange State Bank, which was not revealed until the matter was pending for almost a year between had been known throughout here as the Midland Bank suit against Sunflower and Riegel, which commenced in May of 1978, and was, in my recollection of testimony, approximately April 1979 at a meeting Mr. Hower became aware of it, walked out and sought other counsel. The exact percentage amount range of ownership of Interchange State Bank has not been given to the Court. Whether Mr. Picinich owned one share, 1000 shares, one out of two shares, or 1000 out of two million shares, I don't know. The DR's are a guideline for ethical proceedings of attorneys and for disciplinary proceedings. As a statute; of course, it could be considered as evidence of negligence or even legal malpractice. And if one were to take that position that his failure to disclose because he owned some unknown percentage of shares, we then shift to proximate cause of injury.

The plaintiffs' claim in this case would; of course, be limited to or would include funds of money which ended up going to, as I understand it, Midland Bank in execution of their levy upon the loan account of Mr. Riegel. As I go back to the beginning part, other than the fact that an issue could have been raised, I have no testimony upon which anyone can determine that defense would have prevailed in light of the massive testimony that Mr. Lenihan, the corporate accountant, would testify against the corporation on that issue, after various corporate records, as testified to by Mr. Hower, the 1974 one which is even marked or was shown to him, I believe marked into Evidence as D-1, the Notice of Stockholders Meeting, indicating that there was a loan account, the setting up of the loan account, that they would have prevailed.

I think it's very difficult for a corporation to operate for nine or ten years as a loan account with subsequent tax advantages, to then come to court and say well, please forgive all of those legal tax avoidance maneuvers, call it corporate assets, and really expect to win. There's no doubt the business generated the income. It was done for good reason, good cause, and as I said, legal tax avoidance.

Mr. Riegel fouled the plan up. It was when Mr. Riegel cheated his creditors and they came after him; they found out that he was owed money. They wanted to be paid. Mr. Hower's and Mr. Riegel's plan upsetting this account up, saving their money to buy the property, when down the drain.

There's no testimony that this pleading that answer would have probably led to a different result. As to that this Court doesn't consider Judge Van Tassel's decision as depositive of that issue as to what would have occurred. A factfinder could find that the evidence presented, that it was not fully disposed of or considered by Judge Van Tassel. He deals with it to some extent in his decision. I think one could find it's disposed of, but one could also within it find enough room to move out.

However, it's still the burden of the plaintiff to offer some testimony, or it to be such an obvious conclusion to all, which when looking at it that if that had been presented, the plaintiff would have prevailed. There is no such testimony. And I certainly don't think the obvious conclusion that plaintiff would have prevailed if changing his opinion from that which he had taken, and all the corporate books and records prior to Mr. Riegel taking out fraudulent loans and prior to Mr. Picinich being retained in regard to this matter, whether you want to start with the law suit in May of 1984 or stretching it back to his retention in 1977 when the various depositions were taken or supplemental proceedings in the suit by the bank against Riegel alone. In order for plaintiff to prevail, assuming that there is malpractice, plaintiff has to show or offer testimony upon which a jury could find that it had reasonable probability of resolution in its favor that the status of the funds at the Midland bank were those of corporate assets.

On that point you can—assuming you get to the issue of failure to perform to the standard of care, whether you say it's obvious or whether you say it's a violation of DOR, but if you get to that point, you still have to deal with there's no proximate cause between the loss of the funds to Mr. Riegel, Mr. Riegel's creditors as opposed to going to corporation attributable to that, because there's no testimony upon which one could find that it was reasonably probably that someone would have found that these assets; that is, these funds on deposit at Midland Bank were corporate assets. We had Mr. Hower's assertion that that's what he believed them to be. We have from his own testimony—as I said, I have no argument with any of his testimony and I accept it all. The accountant to the corporation said, no, it doesn't belong to the corporation, and that he was going to testify to support his books and records that he worked on over the years; that they were not a corporate asset and they belonged in a loan account, and they belonged to the individuals. So certainly one cannot say obviously the answer would have prevailed asserting that it was made. Certainly that was an issue in strong dispute by the representative of the corporation, when one would normally expect to testify for the corporation.

In light of those facts and for those reasons, as I stated, accepting the testimony of Mr. Hower and all the testimony presented in a light most favorable to Mr. Hower, and I agree with Mr. Lynch, I stated to him that certain cases have to be tried, I certainly think if I could find way to sent it to the jury, I would prefer to, but I also have the duty to do what the law calls for me to do, and therefore, I'm going to dismiss the complaint of the plaintiff on a finding that there's no sufficient evidence for the matter to be submitted to the jury for the reasons I've set forth.

MR. LYNCH: Thank you, your Honor.

MR. MACKEY: Thank you, your Honor.

Your Honor, the defendant counter claimants, Picinich and Rigolosi, P.A. and ronald J. Picinich, which by virtue of action of the Court have been made counter claimants in this case, voluntarily dismiss the counter claim against Kenneth S. Hower.

THE COURT: That's with prejudice and without cost.

MR. MACKEY: Yes. In addition I just would like to put on the record that the counter claim existing here originally arose and relates to a District Court matter.

THE COURT: I have the docket number.

MR. MACKEY: Filed under Docket 426479.

THE COURT: 426479, and then it was transferred to Superior Court L-13094-84.

MR. MACKEY: Yes, so to the extent that District Court complaint may have some life, the dismissal voluntarily applies to that complaint also. Thank you, your Honor.

MR. LYNCH: Both Mr. Hower and to Sunflower, your Honor.

THE COURT: Yes, all parties.

MR. LYNCH: Thank you.

THE COURT: And dismissed as to all parties. Do you want to submit an order, please.

MR. LYNCH: Thank you, your Honor.

THE COURT: I have some exhibits here, we'll give them back to everybody.

(Whereupon all exhibits are returned to the proper parties.)

THE COURT: We have to bring the jury out.

MR. MACKEY: Your Honor, I appreciate the jury be told what happened.

THE COURT: I would tell I've dismissed the complaint for reasons I've set forth to the attorneys, and you have dismissed your counter claim. Bring the jury out.

(Whereupon the jury enters the Courtroom.)

THE COURT: Ladies and gentlemen, while you were out there was a motion at the end of plaintiffs' case by the defendant to dismiss the complaint because it fails to state a cause of action. For reasons while you were out I set forth at length on the record I dismissed that complaint based upon certain requirements in the law I did not feel they were met sufficiently to be submitted to you for deliberation.

Also the defendant had a counter claim for legal fees. They have voluntarily dismissed that, so that matter is over. So you

have the weekend all to yourselves. And thank you for your service. Without you people sitting here we wouldn't resolve these maters, and we want to thank you for your time and effort you've put into it. I'm sorry it didn't get to you, but we all have certain duties to do here at certain times. But we thank you for your time and effort. You're excused from jury duty.

MR. MACKEY: Thank you, ladies and gentlemen.

THE COURT: Does anybody have any questions, before they run off, just in case you are an inquisitive group?

(Whereupon the jury retires from the Courtroom.)

JUROR TWO: I was wondering why it wouldn't have been helpful to explain some of the legalistic terminology.

THE COURT: Generally what we do in New Jersey is we charge the law and the legal principles at the end of the case.

JUROR TWO: I wasn't so much thinking about that, because I can understand that. But each time a legal terminology was being used; for example, an answer, like I eventually picked up what an answer meant, that it was part of perhaps a brief.

THE COURT: Maybe you're educating these attorneys. The problem you're dealing with we deal with them every day.

JUROR TWO: Right.

THE COURT: And sometimes when you deal with something you deal with every day you don't bring it out, like loan account, bank account, savings account, that's why sometimes you try and get into terminology that everybody understands. You saw when Mr. Jones came he went to different terminology, he was talking about deposit the corporate account, the corporate loan account and --

JUROR TWO: I can understand that was a crucial matter in the deliberations in terms of whether it was really a loan account or not a loan account, or it was just something that was a regular savings account. I understood that was part of the legal, or part of the crux of what the case was going to be decided about.

THE COURT: You just advise attorneys that when they use words they better make sure jurors understand them.

JUROR TWO: Right. Okay, thank you.

THE COURT: Thank you for your time.

(Whereupon Juror Two retires from the Courtroom.)

MR. LYNCH: Just on the record I would like to thank you for all your courtesies in the matter.

MR. MACKEY: Thank you.

(Whereupon Juror Two returns to the Courtroom.)

JUROR TWO: I would like to again tell you I really thought you were trying to be helpful.

THE COURT: That's my function, I hope to be.

APPENDIX E
Letter

September 11, 1986

Honorable Warren Brody
Appellate Division
155 Morris Avenue
Third Floor
Springfield, NJ 07081

Re: SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-01875-85 T1

KENNETH S. HOWER, Individually and as an Officer of SUNFLOWER SEVENTEEN, INC., and SUNFLOWER SEVENTEEN, INC., a Corporation,

Plaintiffs-Appellants,

vs.

PICINICH & RIGOLOSI, P.A., AND RONALD J. PICINICH, Individually

Defendants-Respondents,

Dear Judge Brody:

I am writing to you concerning the above captioned matter which was orally argued before Judge Long and Your Honor on September 9, 1986.

I write the within letter with all due respect for Your Honor, the Court and the Law, and ~~b~~elive ~~by~~ some cruel twist of fate a situation has arisen that potentially could be of great harm to the image and integrity of the court. I write in the hope that this situation can be defused and the name of Justice be preserved.

Subsequent to the oral argument, my client was very upset with me because I did not make the formal presentation I had prepared with his guidance, and angry that the time was spent on discussing the issues of the underlying case. I attempted to ex-

plain to him this was the procedure of the Court to gain information it deemed important; however, he continued to admonish me for my failure to raise points we had included in said formal presentation.

That evening, I received a distressing call from my client, in which he advised me that he had consulted his former attorney and that Your Honor had sat on the appeal in Midland Bank and Trust Company vs. John Riegel, et als. I was surprised and upset with his comments, which implied that the present appeal was not being handled fairly. The thrust of his comments was that it could not be proper for Your Honor to hear the present matter because of Your Honor's prior involvement and decision in that underlying case. He basically said how could Your Honor fairly say Your Honor made an error in the last appeal which raised the key issues of defendant's conflict of interest and Judge Dalton's refusal to let the amended answer be filed. Further, he said he now understood why Your Honor had mentioned issues and fact not raised in the present case on appeal.

I sincerely regret that this situation has arisen; however, I feel that my client, as a layman, fails to see Your Honor's professional ability to not be prejudiced by the prior case. I believe, that in order to protect the Court from any appearance of improprieties, that Your Honor should not render a decision in this matter but ask that this matter be reassigned to another Judge and reargued.

Respectfully submitted,

Dean Lynch

DL:luz
cc: Honorable Virginia A. Long
Richard A. Amdur, Esq.
Mr. Kenneth Hower

APPENDIX F
Superior Court of New Jersey

September 15, 1986

Re: Hower v. Picinich & Rigolosi
A-1875-85T1
Argued September 9, 1986

Dean Lynch, Esq.
P.O. Box 367
1 Essex Street
Hackensack, N.J. 07601

Dear Mr. Lynch:

The request in your letter of September 11, 1986, that I recuse myself from this appeal because I was on the panel that decided the Midland appeal is denied. a party is not entitled to a new judge each time he comes to court. This would be so even if the party were attempting to relitigate an issue that had previously been decided against him by the same judge. Besides, as you correctly argued in your appellate brief, the issues before us in the present appeal are different from the issues that were before us in the Midland appeal. Please be assured that I am not predisposed against your client in deciding the issues in the pending appeal.

Very truly yours,

Warren Brody, J.A.D.

cc: Honorable Virginia A. Long
Richard A. Amdur, Esq.